ORAL ARGUMENT: Not Scheduled

CASE NO. 17-1191 & 17-1206

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

THYME HOLDINGS, LLC d/b/a WESTGATE GARDENS CARE CENTER

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

SERVICE EMPLOYEES INTERNATION UNION LOCAL 2015

Intervenor

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Authorities upon which principal reliance is placed are marked with asterisks

MISC.:

I. PRELIMINARY STATEMENT

The defense posited by the National Labor Relations Board ("NLRB" or "Board") to its decision violates three fundamental tenets of appellate review:

(1) The Board asserts *new* legal grounds to support its decision – grounds this Court is precluded from considering. *SEC v. Chenery Corp*, 332 U.S. 194, 196 (1947).

(2) Without explanation or justification, the Board, repeatedly and significantly, departs from its own precedent. *Jochims v. NLRB*, 480 F.3d 1161, 1167 (D.C. Cir. 2007).

(3) The Board fails to deal with the entire record, choosing to defend its decision by focusing only on that part of the record that supports its conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); and *see also Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 360 (1st Cir. 1980) ("The Board thus may not distort the fair import of the record by ignoring whole segments of the uncontroverted evidence...") No where does the Board dispute the evidence quoted in Westgate's Brief, deciding instead to label it as "conclusory", as if by doing so, the Board alters the evidence.

Plainly stated, the Board simply "picks and chooses" from the evidence and from its precedents to support its desired conclusion. As noted by Member

Miscimarra when commenting on the Board's results-oriented supervisory decisions: "However, perhaps because a finding of supervisor status effectively denies representation to the individuals in question, the Board has tended to evaluate each Section 2(11) factor in isolation, and then construe each factor so narrowly as to compel a conclusion that *nobody* is a supervisor." *G4S Government Solutions, Inc*., 363 NLRB No. 113 (Slip. Op. p. 6) (2016) (Miscimarra dissenting) (original emphasis).[1]

II. ARGUMENT

A. THE BOARD DID NOT FIND THAT WESTGATE'S EVIDENCE WAS CONCLUSORY, AND THEREFORE, THE COURT IS BARRED FROM CONSIDERING THIS ARGUMENT, BUT REGARDLESS, THE EVIDENCE WAS NOT CONCLUSORY.

As described in its Opening Brief, Westgate introduced sufficient evidence to prove that its LVNs "rewarded" the Certified Nursing Assistants ("CNAs") by granting those CNAs wage increases based on completed evaluations, or alternatively, "effectively recommended" the increase. (WBr: 9-26.) The Board *declined* to consider this evidence because it was not *corroborated*. (WBr: 27-28.)

[1] Because the six-page Brief filed by Intervenor Service Employees International Union Local 2015 adds nothing of substance, its arguments are summarily addressed in the last section of this Reply Brief. For convenience, the NLRB's Brief will be referenced as "BBr"; the Intervenor's Brief as "UBr"; and Westgate's Opening Brief as "WBr". The Joint Appendix is referenced as "App".

Unable to provide a legal justification for its corroboration requirement, the Board changes the basis for its decision by reclassifying Westgate's evidence as "conclusory":

> "Unfortunately, for the Company, the two managers at issue [who testified] provided mostly generalized or conclusory testimony, with few specific examples to substantiate their statements regarding the scope of the LVNs' purported authority." (BBr: 24.)

Having reclassified the evidence, the Board argues that, by requiring corroboration, it was simply applying its well-established rule that conclusory evidence is insufficient to establish supervisory status. (BBr: 21-23.) *However, in its Brief, the Board does not cite any portion of its decision to support this reclassification because the decision contains no such "finding".* (BBr: 21-25.)[2]

Nor can the Board use the "lack of corroboration" language in its decision to assert that such language is *customarily used* by the Board when it finds evidence to be conclusory. Although the Board cites numerous cases for the proposition that conclusory evidence is insufficient, in *none of those cases did the Board use "lack of corroboration" terminology.* In Board parlance, conclusory evidence is rejected:

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[2] The relevant portion of the Board's decision is on pages 465 to 469 of the Appendix. Although the Regional Director cited the general rule regarding conclusory evidence, in her "analysis", dealing with the LVNs' power to reward, she did not disregard Westgate's evidence because she found it to be "conclusory". (App. 460.) Even the *one-time* she used the word "conclusory" she did so in terms of the testimony not being *substantiated* by "documentary evidence". (App. 467.)

(1) because "the testimony is utterly lacking in specificity". *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); or

(2) because "conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority". *G4S Regulated Security Solutions*, 362 NLRB No. 134 (2015); or

(3) because the record "fails to reveal any evidence" of the purported authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007).

The Board's attempt to convert the phrase "a lack of corroboration" into an "insufficiency of evidence" argument does violence to the legal definition of "corroboration". Evidence is corrobative when it "strengthens or confirms what other evidence shows". *Black's Law Dictionary*, 10th Ed., 2014, p. 674; and *see also United States v. Stewart*, 420 F.3d 1007, 1020 (9th Cir. 2005). It is *supplementary evidence*. *Garner's Dictionary of Legal Usage*, 3rd Ed., 2011, p. 227. In fact, the Board has shown the ability to *correctly* use the term in supervisory determination cases. *E.g. Sheraton-Universal Hotel*, 350 NLRB 1114, 1118 (2007) ("...we find that this evidence [of secondary indicia] corroborates our determination of his 2(11) status").

Because the Board is unable to justify its corroboration rule, the Board is asking this Court to disregard its stated reason for ignoring Westgate's evidence (a lack of corroboration) and replace it with a new reason (the conclusory nature of

the evidence). The Board is barred from rewriting its decision, and this Court is precluded from considering counsel's argument. *Macmillian Publishing Co. v. NLRB*, 194 F.3d 165, 168 (D.C. Cir. 1999) citing *SEC v. Chenery Corp*. 318 U.S. 80 (1943).

Regardless, the Board's new theory fails for a more fundamental reason: Westgate's evidence was not conclusory. Board cases are replete with examples of conclusory testimony regarding supervisory status. *E.g., Austal USA, LLC*, 349 NLRB 561, n.6 (2006) ("Most of Respondent's testimony is comprised of conclusory statements in Gate's affidavit, like 'I make the work assignments to the crew' and 'I...check on the crew to make sure they were completing the work assignments given to them.'")

Here, *if* Westgate's evidence had been that "the LVNs had the power to evaluate the CNAs" and that "those evaluations were used to determine the CNAs' wage increases", that would be conclusory. But, testimony as to *what occurred* is not conclusory; it is factual. As detailed in Westgate's Opening Brief (WBr: 12-26):

1. The LVNs *were told* that they would be evaluating the CNAs and that their evaluations would determine the CNAs' wage increase.

2. The CNAs *were told* that their raises were dependent on the LVNs' evaluation.

3. The LVNs *were given* a job description that stated they would be evaluating the CNAs (among additional supervisory powers given them).

4. The LVNs *were given* evaluation forms to complete.

5. The LVNs *completed* the evaluation forms.

6. The evaluation forms *were scored*.

7. The evaluation score *determined* the wage raise given each CNA.

8. The CNAs *received* a wage increase.

9. All of the evaluation forms were *introduced into evidence*.

10. A chart summarizing the evaluation forms and payroll records was *introduced into evidence*.

Facts 1 through 10 were testified to by either Eric Tolman or Kulsum Hussain or by both individuals. In addition, LVN Gonzales testified to facts 3, 4, and 5 and did not dispute facts 1, 2, 6, 7, 8, 9, or 10.[3] In its Opening Brief, Westgate provided the Court with the actual transcript testimony establishing these facts, and much more. (WBr: 12- 15, 16, 19-24.) The Board may not simply ignore these facts by labeling them as "conclusory", when clearly they are not.

[3] In fact, the Board finally concedes the point that LVN Gonzales' testimony, *considered in its entirety*, does not contradict Tolman's testimony that the LVNs were told that their evaluations would determine the wage increase to be given the CNAs. (BBr: 34 n.12.) Nonetheless, the Board asks the Court to reject Tolman's testimony because it "remains unsupported by any other evidence". *Id*. The Board *continues* to impose a "corroboration" requirement on "management" testimony.

B. THE BOARD'S ARGUMENT THAT THE LVNs FAILED TO EXERCISE INDEPENDENT JUDGMENT WHEN THEY EVALUATED THE CNAs BECAUSE THE LVNs DID NOT "COMPARE DATA" CANNOT BE CONSIDERED BY THE COURT, IS CONTRARY TO BOARD PRECEDENT, AND IS FACTUALLY UNTRUE.

The Board's first fall back position is to assert that even if Westgate's evidence is considered, Westgate failed to demonstrate that the LVNs exercised "independent judgment" in evaluating the LVNs. The Board correctly notes that, to exercise independent judgment, an individual must "act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data" (citing *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006)).

Because there is no question that the LVNs evaluated the CNAs "free of the control of others", the Board argues that the evidence fails to prove that the LVNs evaluated the CNAs "by discerning and comparing data". Specifically, the Board asserts, "There is no evidence as to what factors, if any, the LVNs considered in selecting among the various gradations of performance." (BBr: 36.)

There are three problems with this argument: (1) it was not the basis of the Board's decision; (2) it is contrary to Board precedent; and (3) it is contrary to the factual record. Each is discussed in turn.

1. THE BOARD'S DECISION DID NOT RELY ON A FAILURE TO COMPARE DATA AS THE BASIS FOR ITS FINDING THAT THE LVNs DID NOT EXERCISE INDEPENDENT JUDGMENT.

The Board's decision that the LVNs did not exercise independent judgment was premised *solely* on Westgate's use of a prepared evaluation form. This is what the Board stated:

> "To the extent that LVNs were required to use this prepared evaluation form, the subsequent utilization of such form does not reflect the exercise of independent judgment on the part of the LVNs."

There is not a single word in the Board's decision to the effect that the LVNs did not exercise independent judgment because they failed to discern and compare data in filling out the form. (App. 465-469.) Unable to defend its decision, the Board asks this Court sustain its decision on an alternate ground - something the Court cannot do. *SEC v. Chenery Corp., supra*.

2. UNDER BOARD PRECEDENT, FILLING OUT AN EVALUATION FORM CONSTITUTES THE USE OF INDEPENDENT JUDGMENT BECAUSE IT NECESSARILY REQUIRES THE COMPARISON OF DATA.

The Board's conclusion that completing a preprinted evaluation form (or its new argument that the LVNs failed to "compare data") proves that the LVNs failed to exercise independent judgment is contrary to Board precedent. In its Opening Brief, Westgate cited *seven* Board cases holding that completing an evaluation form, that results in a wage increase, constitutes the exercise of "independent judgment" and, therefore, is proof of supervisory status. (WBr: 10.)

Significantly, the Board's Brief makes no effort to distinguish these cases. Indeed, except for one of the cases, *Extendicare Health Facilities, Inc*., 330 NLRB 1377 (2000), the Board's Brief does not even cite, no less discuss, these *controlling* cases.[4]

In each and every one of these seven cases, the evaluating LVN used a "preprinted evaluation form" analogous to the one used by Westgate's LVNs. One example from the seven cases proves the point:

> "The LPNs, using evaluation forms which include 16 items covering work performance and personal characteristics, assign numerical scores from 1 to 10 to each item. Thereafter, an overall average score is computed."
>
> *Bayou Manor Health Center, Inc*., 311 NLRB 955 (1993).

In none of these cases did the Board hold that the use of a preprinted form demonstrated a lack of independent judgment. Moreover, *in none of these cases* did the Board require the Employer to show that the LVNs compared "specific" data in rendering their evaluations. Indeed, such a requirement is nonsensical given that, *by definition*, completion of an evaluation form requires the evaluator to compare data; *that is what evaluate means*, common synonyms being "assess", "appraise" and "measure". *Merriam-Webster's Dictionary & Thesaurus* (2014), p.

[4] Although the Board cites *Extendicare*, it distinguishes it on a minor and different point: whether the LVNs collaborated with others in completing the evaluations. (BBr: 33, n. 11.)

283. "Evaluate" is defined as "to determine the significance, worth, or condition of, usually by careful appraisal and study". *Id*.

Here, the LVNs were required to evaluate the CNAs on "job knowledge", "work quality", "attendance", "punctuality", "initiative", "communication", and "dependability". Unless the evaluator marked the form *randomly* (which the evidence demonstrates did not occur), *it is impossible to evaluate an individual on these characteristics without comparing data*; i.e. how often did the CNA report to work on time. The Fourth Circuit made precisely this point in *Caremore, Inc. v. NLRB*, 129 F.3d 365, 370 (1997) stating:

> "It remains only to determine whether the authority exercised by Caremore's LPNs required the use of independent judgment. ... The evaluation forms contained in the record indicate that the LPNs were responsible for rating aides' performance on a 20-point scale for each of seven performance dimensions....*These kinds of sensitive and nuanced judgments are hardly routine*, and we have held in our prior cases that the authority to evaluate other employees or to recommend that they be disciplined satisfies the requirements of Section 2(11) of the NLRA."
>
> (emphasis added.)
>
> *See also Beverly Enterprises Virginia, Inc. v. NLRB*, 163 F.3d 290, 295 (4th Cir. 1999).

While the Board is free to change its precedent, it is not free to ignore it if it wishes to have its decision sustained upon appeal. *Jochims v. NLRB, supra.* The Board is required to explain why, in these seven cases, it found that the LVNs used independent judgment while, in this case, independent judgment is lacking. *See*

also Wal-Mart Stores, Inc., 335 NLRB 1310 (2001) (completion of performance appraisal "is an exercise of independent judgment" even though it is done in the presence of higher management). [5]

3. THE RECORD EVIDENCE DEMONSTRATED THAT THE LVNs COMPARED DATA IN COMPLETING THE EVALUATION FORMS, AND THE BOARD'S CONTRARY ARGUMENT IS BASED ON "CHERRY PICKED" EVIDENCE.

Assuming *arguendo* that this Court were to consider the Board's new argument that the LVNs did not exercise independent judgment because they failed to compare data, *as a factual matter*, that argument fails. As the Board's Brief concedes, LVN Gonzales testified in detail as to what he considered when he completed the evaluation forms (BBr: 36) and that testimony, because it is so powerful, is quoted verbatim in Westgate's Opening Brief. (WBr: 39-40, 42-43.)

Because Gonzales' testimony is proof positive that the LVNs did "compare data", the Board's Brief "cherry-picks" his testimony in an effort to convince this Court that, in the Board's words, the LVNs made "quick routine judgments" and "simply jotted down their general impressions". (BBr: 35-36.) Comparing the

[5] The Board does cite this Court's decision in *VIP Health Services v. NLRB*, 164 F.3d 644, 649 (D.C. Cir 1997) to support its claim that completing an evaluation form is an not an exercise of "independent judgment", but, in that case, *the nurses doing the evaluations testified* (1) that they did not base their evaluations on a regular monitoring of the aides and (2) that they made a quick, impressionistic judgment when filling out the forms -- a far cry from Gonzales' testimony in this case. Here, Gonzales' testimony demonstrates that he took great care in trying to judge the CNAs as fairly as possible and to ensure the accuracy of the evaluation.

Board's paraphrase to Gonzales' *actual testimony* demonstrates that the Board's factual claim is disingenuous.

For example, the LVNs were required to evaluate the CNAs on their "work quality". (WBr: 18.) The Board's Brief paraphrases Gonzales' testimony as follows:

> "Gonzales testified that he evaluated 'work quality' by simply considering whether the CNA seemed to handle residents well, adding that the residents are 'either done good or they not done good.'" (BBr: 36.)

This paraphrasing is a far cry from Gonzales' *actua*l *testimony*:

> Q In general, what did you evaluate in terms of work quality? What did you take into consideration?
>
> A [Mr. Gonzales] The care of the patients, the effectiveness, the happiness of the patients, the duties that go along with their job. You know, does she do them effectively really. I mean, there either done good or they're not done good. You know, it could say half, half, you know. They don't take the time to do it well or, you know, and that's basically what it is. Their job assignment, they're going to -- you can see if they're a good CNA or they're not.
>
> (App. 364-365.)[6]

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[6] The Board mistakenly claims that by asserting that the LVN's could use their own "arbitrary" standards and still satisfy the "independent judgment" test, Westgate is challenging the *Oakwood Healthcare* definition. (BBr: 38 n. 13.) In fact, Westgate accepts the Board's definition of "independent judgment" but notes that nothing in that definition precludes an LVN from defining "work quality", or any of the other factors, in whatever manner she wishes and then evaluating the CNA using that criteria as long as the LVN "compares data". (WBr: 37 n. 16.) In other words, nothing in *Oakwood* dictates the criteria, arbitrary or not, that the employer uses.

This *identical showing* can be made with respect to each of the other factors that the Board cites in its Brief. (BBr: 36.) *In each case*, the Board cherry-picks one sentence from Gonzales' testimony to make it appear that he did not compare data or give serious thought to the evaluation process.[7] When the evidence is reviewed, in its entirety, the only possible conclusion is that the LVNs did form their opinions by discerning and comparing data - exactly the type of "sensitive and nuanced" judgments that the Fourth Circuit found constituted "independent judgment" in *Caremore, Inc. v. NLRB*, *supra*, at 370.[8]

C. THE BOARD'S RELIANCE ON A FEW DISCREPANCIES BETWEEN THE EVALUATION RATING GIVEN ON THE FORM AND THE WAGE INCREASE RECEIVED FAILS BECAUSE IT DOES NOT COMPORT WITH PRECEDENT.

The Board's final refuge is to argue that none of this matters because the evidence is insufficient to demonstrate that the LVNs' evaluations controlled the amount of the wage increases received by the CNAs (thus breaking the causal link

[7] The word limitation on briefs precludes Westgate from making the comparison for all of the evaluation factors. Westgate directs the Court to pages 39-43 of its Opening Brief where Gonzales' testimony is quoted verbatim, not paraphrased.

[8] In addition to "cherry-picking" the evidence, the Board fails to set forth what "data" the LVNs *should have considered* in evaluating the CNAs. The Board has no answer to that question because it is up to the employer, not the Board, to make that determination. A fair reading of Gonzales' testimony demonstrates that he took into account *relevant* criteria.

necessary to establish that the LVNs had the power to "reward"). (BBr: 27- 34.)[9] The Board would have the Court believe that Westgate went through the time, trouble, and expense of establishing this evaluation system and then chose to ignore the results. Why, goes unexplained.

To support its argument, the Board cites discrepancies between the increase given and the evaluation rating to argue that the Court should disregard the fact that in the vast majority of cases there is a correlation between the two. Moreover, for the most part, the Board relies upon two irrelevant facts: (1) a missing "overall evaluation" on the form, or (2) an "overall evaluation" that does not match the ratings given on the individual rating factors. (BBr: 27-28.)[10]

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[9] Because the Board does not reference them in its Brief, it appears to have abandoned its nonsensical positions that some of the evaluations were deficient because they contain "numbers" instead of "checkmarks", or because they were undated, or because they lacked a narrative comment. (WBr. 44-45.)

[10] In its Opening Brief, (WBr: 46-51.) Westgate addressed the discrepancies and will not repeat that analysis here other than to comment on the "two charts" included in the Board's Brief. On pages 28-29, the Board produces a chart where the "overall rating" that the LVN gave the CNA, in eleven cases, does not correlate with the wage increase given. However, when the numerical rating set forth on the individual categories on the forms are totaled and averaged, *7 of the 11 do correlate* (Alcantar, Gladsden, Gainey, Ramos, Rivera, Rodriguez & Zamora). On pages 30-32, the Board produces a chart showing that in 15 cases, there was no "overall evaluation"; yet the Board does not dispute, and its own chart demonstrates, that the individual ratings in these 15 cases (when totaled and averaged) *do correlate*, in the majority of cases, with the wage increase given.

Essentially, the Board asks this Court to require a 100% correlation, and absent such a correlation, asks the Court to agree that "someone" else was determining the amount of the wage increase (versus potential human error). But, the Board *does not argue* that "someone else" made the determination in the vast majority of cases where the evaluations correlate. *Surely, in those cases, the LVN either made the determination or made an "effective recommendation*".

Thus, assuming *arguendo*, that, in a few cases, the Director of Staff Development made the decision as to the amount of the increase given, all that means is that *in a few cases, the LVNs' recommendation was not accepted*. It says nothing about the fact that in the vast majority of cases the recommendation was accepted – all that is necessary to prove that the LVNs' had the power to "effectively recommend". *No Board case holds that "effectively recommend" means the recommendation is accepted 100% of the time – a requirement that the Board now seeks to have this Court impose on the statutory language*.

While the Court could spend time analyzing each and every evaluation to determine whether a "sufficient correlation" exists, ultimately that is not necessary because the Board concedes that for the vast majority of cases a correlation does exist between the specific evaluation and the raise given. More significantly, as discussed next, because LVNs did multiple evaluations, a correlation prevails with respect to *each* LVN even if a specific evaluation does not correlate. In other

words, because they did multiple evaluations, for each LVN, the Court *can find* an evaluation *that does correlate*.

The Board's reliance on a few discrepancies misses the "forest for the trees" and ignores controlling precedent. Those precedents, none of which the Board cites, stand for three rules:

(1) It is the existence of supervisory authority that is critical, not its exercise.

An individual is a supervisor if the individual possesses the authority to reward, even if the power is not exercised, or is exercised infrequently. As stated in *Allstate Insurance Company*, 332 NLRB 759, 760 (2000):

> "With respect to supervisory authority, the rule is clearly established in Board precedent, that *possession* of authority consistent with any of the indicia of Section 2(11), not the exercise of that authority, is the evidentiary touchstone." (original emphasis.)

See also Mountaineer Park, Inc., 343 NLRB 1473, 1474 (2004); Pepsi-Cola Co., 327 NLRB 1062 (1999); *Fred Meyer Alaska, Inc*., 334 NLRB 646, 649 n. 8 (2001); and *Wal-Mart Stores*, 340 NLRB 220, 223 (2003).

(2) The individual need not even possess the power to reward as long as the individual possesses the power to "effectively recommend" the reward.

"The statutory definition of 'supervisor' expressly contemplates that those employees who 'effectively recommend' the enumerated actions are to

be excluded as supervisors." *NLRB v. Yeshiva University*, 444 U.S. 672, 683, n. 17 (1980).

(3) It is not necessary that every individual exercise the power as long as the class of individuals possesses the power.

"We do not draw a distinction between those account representatives who in fact have exercised their authority to discharge and those who have not; the determinative factor is that all such account representatives possess the authority to do so. Accordingly, we find that all account representatives who have merchandisers assigned to them or their team, are statutory supervisors as defined in Section 2(11) of the Act. " *Pepsi-Cola*, *supra*, 327 NLRB at 1064; and *see also Fred Meyer Alaska, Inc*, *supra*, 334 NLRB at 649 n. 9.

Based on these controlling rules, all that Westgate was required to prove was that its LVNs, as a class, possessed the power. Westgate was not required to prove, as the Board's Brief implies, that *every* LVN exercised the power. The Board's effort to find some discrepancies in the evaluation ratings fails when the vast majority of the evaluations correlate, thus proving, that the LVNs, as a class and at a minimum, had the power to "effectively recommend" a reward.

The Board also fails to refute the factual point (made on pages 51-52 of Westgate's Opening Brief) that of the 19 LVNs who did evaluations, all but two

evaluated multiple CNAs. Therefore, the fact that a LVN's *particular* evaluation does not correlate does not detract from the fact that *other evaluations*, *done by same LVN*, *do correlate*. The Board has no way of dealing with this fact so it simply does not address it.

Moreover, with respect to the few evaluations were a direct correlation is missing, it is rather obvious that the evaluations were still used *as the basis for the wage increase given*. The Director of Staff Development testified that she did not re-evaluate a single CNA. (App. 166-168.) She simply scored the evaluations completed by the LVNs. Thus, even where a direct correlation is missing because she made a scoring mistake, the LVN was effectively recommending "some" increase inasmuch as no CNA was given an "unsatisfactory" rating, resulting in no wage increase. (App. 156.) Thus, the "effectively recommend" test is, again, satisfied.

Finally, the Board's Brief also fails to discuss the fact that after completing the "global" evaluations of all the CNAs, these same LVNs would continue to evaluate the CNAs as they "hit" their hiring anniversary date, and that each such evaluation would determine the CNA's wage increase. Westgate made this fact known to the LVNs and the CNAs. (App. 48.)

Regardless of any past discrepancies, the LVNs possessed this authority *going forward*. In and of itself, that would be sufficient to establish their

supervisory status (even if the "global" review had never occurred) *because the "power to reward" was possessed by the LVNs*.

However analyzed, whether from a perspective of (1) correlation, (2) "effectively recommending", or (3) future action, Westgate established the LVNs' supervisory authority under the Board's tests. The Board's ability to seize upon a few discrepancies cannot override its precedent.

D. BECAUSE THE LVNs HAD JUST RECENTLY BEEN BROUGHT INTO THE HIRING PROCESS, THERE WERE LIMITED EXAMPLES AVAILABLE TO PROVE THEIR HIRING AUTHORITY.

As Westgate's Opening Brief established, *a few months before the representation hearing* the LVNs were brought into *the hiring process*. (WBr: 62-64.) Because this was a new role for the LVNs, there were not a lot of examples upon which to draw to demonstrate the extent of the role played by the LVNs. (App. 469.) Nonetheless, in at least one such case, the LVN's recommendation was the deciding factor in the decision to hire the applicant. (App. 165-166.)

The Board attacks this evidence by arguing (1) that a single isolated example is insufficient to prove such authority, and (2) that, in any event, the LVN's hiring recommendation was accepted only because the LVN had "personal" familiarity with the applicant. (BBr: 41-42.)

While the former is true as a general proposition, the rule does not apply when there has not been a sufficient opportunity for examples to arise. *See*

Lakeland Heath Care Associates, LLC v. NLRB, 696 F.3d 1332, 1338 n.6 (6th Cir. 2012). Here, given the short period of time the LVNs were involved in the hiring process, the one example was sufficient to demonstrate the authority "going forward".

As to the latter, the Board errs in asserting that the LVN's "personal familiarity" with the applicant means that the LVN did not participate in the hiring process. The Board cites the Court to one forty-year-old case. But in that case, *Jefferson Chemical*, 237 NLRB 1099, 1102 (1978), the individual *did not participate* in the *hiring process*: "The fact that a recommendation for the employment of an applicant is approved out of respect for the judgment of another, rather then because of the his delegated authority to participate in the hiring process, is not an indicium of supervisory authority."

In contrast, here, the LVNs were *an integral part of the hiring process* and the accepted recommendation "to hire" was made *in that context without any additional investigation.* (App. 165-166, 171-172, 253-254.) *E.g., USF Reddaway Inc*., 349 NLRB 329 (2007) (leadmen are supervisors where they participate in the hiring process because they effectively recommend). For the same reason, in *NLRB v. Missouri Red Quarries*, 853 F.3d 920, 927 (8th Cir. 2017) the Court *distinguished Jefferson Chemical* on the ground that it was not controlling where

there was substantial evidence that no independent investigation was conducted into the applicant's qualification.

E. WESTGATE HAD A "PROGRESSIVE DISCIPLINE" SYSTEM AND A DISCIPLINARY WARNING COULD ULTIMATELY RESULT IN A CNA's SUSPENSION OR TERMINATION.

Westgate's LVNs were routinely involved in issuing disciplinary warnings to the CNAs or effectively recommended the issuance of such warnings. (WBr: 59-62.) The Board's retort is to assert that the discipline imposed was irrelevant because there was no evidence that the discipline "lead to any actual discipline of a CNA or otherwise affect[ed] their terms and conditions of employment." (BBr: 50.)

The Board makes this argument in the face of Tolman's testimony – which the Board cites --that the facility used a progressive discipline system of an "in-service training, verbal warning, written warning, and then potentially termination." (BBr: 51.) The Board asks this Court to ignore this testimony because Tolman subsequently testified that the third step might be another written warning or a suspension, before termination. *Id*. Obviously, whether the facility required one written warning or two written warnings and/or a suspension prior to terminating an employee does not detract from the fact that a written warning (or two) had *real work consequences* for an employee; to wit, it could ultimately result in the employee's termination.

Indeed, in making this argument, the Board, yet again, ignores its own precedent. In *Progressive Transportation Services, Inc*., 340 NLRB 1044 (2003) the Board held:

(1) to establish a progressive discipline system there need not be "a rigid and inflexible system under which discipline always leads to a precise impact on employment [as long] the discipline has the real potential to lead to an impact on employment" (*Id*. at 1046); and

(2) the existence of such a system can be shown by the "very format of the [disciplinary] notices" used that contain a notation that the discipline is a 'verbal warning', 'written warning', 'suspension', 'commendation', or 'other'." (*Id*. at 1044, 1046).

Here, as Tolman testified, written warnings can *eventually* lead to a suspension or termination. In addition, and as in *Progressive Transportation*, Westgate's "corrective action form" set forth the "steps" in its progressive discipline process, to wit, "oral counseling", "written warning", "suspension", and "termination". (App. 611-647.) In fact, Westgate's "form" went further than the form in *Progressive* in establishing the existence of its disciplinary system because Westgate's form *contained an additional line*: "Consequence of Failure to Improve". In many cases, as *Westgate's Exhibits show*, the CNA, upon being given the warning, was explicitly advised that a subsequent violation would result

in a suspension or termination. (App. 619-622, 624-626.) The Board, of course, ignores this evidence and its own precedent.

As usual, the Board then retreats to its fallback position that, in any event, the LVNs did not exercise independent judgment in issuing these warnings or recommending their issuance. (BBr: 52.) But, the fact is that in the vast majority of cases, the warnings were issued without the knowledge of any higher management official. (App. 75-76, 94-96, 145, 196.) Even when the Director of Staff Development was involved, in the vast majority of those cases the LVNs' brought the matter to the Director's attention and the LVN's recommendation was accepted *without additional investigation*. (App. 195.)

Under *Mountaineer Park, Inc*., *supra,* another case the Board ignores, the LVNs are supervisors because, under these circumstances, they "effectively recommend" discipline. ("In this regard, they have the authority to bring employee rule infractions and misconduct to Rellis' attention, thereby *initiating the disciplinary process*; and, in the process of doing so, they can write up recommendations for Rellis concerning what level of discipline they consider to be appropriate...Further, and most significantly, when they decide to bring disciplinary issues to Rellis' attention, it appears that Rellis *does not conduct an independent investigation* of the incident in question." 348 NLRB at 1473-4.) (emphasis added.)

F. THE LVNs ASSIGNED WORK DUTIES TO THE CNAs AND MADE THOSE ASSIGNMENTS USING INDEPENDENT JUDGMENT.

As Member Miscimarra stated, in dissenting from the Board's decision to deny Westgate's Petition for Review:

> "I … believe that substantial questions exist regarding whether the LVNs possess authority to assign other employees.." (App. 513)

The evidence cited in Westgate's Opening Brief demonstrated that the LVNs regularly and routinely assign work to the CNAs. (WBr: 53-59.) Throughout their shifts, the LVNs instructed the CNAs as to what duties to perform and where to perform them. The Board's defense to this evidence is to argue (1) that the LVNs did not determine the CNAs' work shifts or overtime (a point never asserted by Westgate); (2) that the change in work assignments was merely an inconsequential "sequencing" change; and (3) that, in any event, the LVNs did not use "independent judgment" in making assignments. (BBr: 42-48.)

The Board has held that the term "assign" includes the act of designating an employee to a place or location within a work facility or directing an employee to perform specific overall tasks. *Oakwood Healthcare, Inc*., *supra*, 348 NLRB at 689. Assign does not include directing an employee to a "discrete" task within the overall assignment. For example, designating an individual to "administer medications" would constitute an assignment while designating a specific patient to receive the medication would not. *Id*.

In its Brief, the Board now eschews its own definition to assert that the "authority to sequence work within a shift does not qualify as authority to 'assign'". (BBr: 44.) In *Oakwood,* the Board held that sequencing, or changing the order of *discrete tasks* within an assignment was not indicative of the "power to assign", but sequencing "overall tasks" was. Here, the LVNs were *moving* the CNAs from caring for patients, to working in the dining room, or to distributing food trays. (App. 101, 179-193, 255-256, 423-427.)

The Board's fallback position that the LVNs did not exercise "independent judgment" in making these assignments is equally lacking in merit. According to the Board, making these assignments requires no judgment. The Board argues: "…the LVNs are merely following an already established pattern [of work assignments], which requires no independent judgment" and any assignment did not consider the "relative" skills of the CNAs (BBr: 46-47.) But, as the Board held in *Oakwood Healthcare*, *supra*, 348 NLRB at 695, "[i]n the health care context, choosing among available staff frequently requires a meaningful exercise of discretion" and "[m]atching a nurse with a patient may have life and death consequences."

G. THE UNION'S ARGUMENTS RELY ON SECONDARY INDICIA, MISSTATE THE RECORD EVIDENCE, AND RAISE ISSUES NOT CONSIDERED BY THE BOARD.

The Union's Brief adds nothing of substance to the discussion. First, the Union argues that finding the LVNs to be supervisors would result in an excessively high number of supervisors. (UBr: 2-3.) But, this factor is secondary indicia and is neither directly relevant nor controlling. *Maine Yankee Atomic Power Co. v. NLRB*, *supra*, 624 F.2d at 365 ("...the Acting Regional Director further ignored legitimate Company considerations by concluding that to find the SOS's to be supervisors would create an unrealistic supervisor ratio...We think that as a general proposition a determination of the proper number of supervisory personnel...is a matter for the employer, not the Board.").

The Union's argument also misstates the ratio by failing to use "real" numbers. The Union argues that finding the LVNs to be supervisors would cause there to be a total of 55 supervisors by counting 37 LVNs, 12 RNs, and 6 other management officials. *Id*.

In truth, there are not 37 LVN supervisors. There are 22 full-time LVNs and 15 part-time LVNs *who only work when a full-time LVN is absent*. (App. 227, 458.) Second, because the facility works 24 hours a day, 7 days a week, the 22 LVNs are divided over 14 individual, 12-hour shifts. (App. 32.) When correctly analyzed, on a normal day shift there are 7 LVNs present, divided among three

nurse's stations, and only 4 or 5 LVNs present at night, also spread out over three nurse's stations. (App. 35-37.) Moreover, these LVNs are not "sitting around" supervising the CNAs. Quite to the contrary, as described by Gonzales, their shifts are quite hectic with their own job duties. (App. 370-371.) To simply compare "numbers" to assert that the ratio is unrealistic ignores how a nursing home operates. Indeed, for approximately 78% of the time the LVNs are the most senior management official in the facility. (App. 18, 29-30.) The Union's argument, by focusing on "numbers", taken out of context, ignores reality.

Second, the Union seeks to rely on the secondary indicia of the facility's job description to argue that the job description did not contain any mention of the LVNs' supervisory authority. (UBr: 4.) The Board does not make this argument because it is flagrantly false. The evidence demonstrated that *in July 2016* a new job description was promulgated and *that was the job description in effect at the time the representation petition was filed.* The numerous supervisory references *contained* in that*, the only relevant job description,* were set forth in Westgate's Opening Brief (WBr: 65-66.). The Union misleads the Court by arguing otherwise.

Third, the Union argues that the Westgate had an improper motive for making its LVNs supervisors. Motive is an irrelevant factor, and the Union cites

no supporting authority. Regardless, the Court is foreclosing from considering the argument because the Board did not rely upon "motive" as a basis for its decision.

Finally, the Union devotes one page of its Brief to arguing the merits. (UBr: 5.) Because its arguments and factual claims overlap the Board's arguments, they have already been addressed.

VIII. CONCLUSION

The Board's continuing refusal to find LVNs to be supervisors, except when liability for their conduct can be affixed to their employer, is again evidenced in this case. When the record as a whole is considered, the Court should conclude that Westgate's LVNs are supervisors, grant the Petition for Review, and deny enforcement of the Board's Decision.

Dated: March 2, 2018

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), because excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,484 words.

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Dated: March 2, 2018

Respectfully Submitted

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CERTIFICATE OF SERVICE

This certifies, under penalty of perjury under the laws of the United States, that on this date I, a citizen of the United States, and an attorney, licensed in the State of California, electronically filed the following documents in Case Nos. 17-1191 and 17-1206 with the United States Court of Appeals, District of Columbia Circuit, by using the Court's CM/ECF system: **Petitioner's Reply Brief**.

I further certify that the foregoing document was served on all parties, or their counsel of record, through the CM/ECF system if they are registered users, and, by mailing two copies thereof, via United States priority mail, to the below listed addresses.

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